Supreme Court, U.S.
FILED
NOV 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1910

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BUSINESS ELECTRONICS CORPORATION,
Petitioner,

v.

SHARP ELECTRONICS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a manufacturer has engaged in an illegal conspiracy to fix resale prices simply because it has terminated a dealer following price-related complaints from a competing dealer.

Whether a price-cutting free-rider may be terminated by the manufacturer at the behest of a full-service dealer without action being regarded as a per se vertical "price-fixing" conspiracy.

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the National Association of Manufacturers in support of Respondent, Sharp Electronics Corporation ("Sharp"). Consent from counsel for both parties has been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers of the United States of America ("NAM") is a non-profit voluntary business association incorporated under the laws of the State of New York. The NAM represents approxi-

mately 13,000 companies, large and small, located in every state of the Union. Further, the NAM is affiliated with an additional 158,000 businesses through the Associations Council and the National Industrial Council. The membership of the NAM represents an estimated 80 percent of all goods manufactured in the United States.

As the principal representative of America's manufacturing community, the NAM has had a long and substantial interest in matters relating to the distribution and marketing of manufactured products. It believes that efficient operation of our large national economy requires that rules regulating trade be clear, predictable, and economically rational, and that they be consistently applied by government enforcers and courts.

Thus, the ramifications of particular antitrust decisions may extend far beyond the parties and strike at the heart of our competitive national economy.

The vast majority of NAM members are subject to the jurisdiction of the federal antitrust laws. As active participants in the free-market system of the United States, NAM's members have a vital interest that these laws be interpreted according to consistent and predictable standards and in ways which enhance business efficiency and consumer welfare.

STATEMENT

Sharp is a supplier of various consumer and business products, including calculators, and distributes these products through retail dealers. During the period prior to this suit, Sharp wanted its dealers to emphasize pre-sale educational and promotional services in order to stimulate interest and demand, and provided them with suggested resale price lists. One of its dealers in the Houston area, Petitioner Business Electronics Corporation ("BEC"), often sold at prices lower than those on Sharp's suggested retail price list.

In 1972, due to BEC's inability to meet its sales quotas, Sharp appointed Gilbert Hartwell as a second dealer in the Houston area. Hartwell was a full-service dealer, with an extensive advertising program and a trained sales staff that demonstrated and discussed Sharp products with prospective customers. After Hartwell's appointment, BEC dispensed with advertising and its sales force, while undercutting Hartwell's prices.

Hartwell was justifiably concerned that he did not have an exclusive dealership in the Houston area, as he had expected, and he complained to Sharp. In addition, he complained that BEC was able to free ride on his investment in product promotion and other sales-related services. Hartwell presented a "him or me" ultimatum to Sharp, and Sharp was forced to choose between giving an exclusive territory to Hartwell or, by operation of the ultimatum, give up Hartwell's business and sell through BEC. Sharp chose Hartwell, and was sued by BEC.

At no time did Sharp require compliance by either Hartwell or BEC with its suggested retail price list. In fact, Hartwell complained that all he ever heard from Sharp was "the same broken record, that a manufacturer could not tell a dealer what to sell his product for . . . [n]o matter who I talked to . . . I heard that over and over." Moreover, Hartwell himself did not always adhere to Sharp's suggested retail prices.

Nevertheless, the trial judge instructed the jury to find a per se violation of the Sherman Act if it found an understanding between Hartwell and Sharp to terminate BEC "because of" BEC's price cutting. On appeal, the Fifth Circuit ruled that a manufacturer that terminates a price-cutting distributor following complaints from a competing distributor is not per se liable for illegal price fixing unless there is proof of an agreement on price between the manufacturer and the competing distributor. It reversed a jury verdict for BEC, and remanded the case for further deliberations under this standard.

The Fifth Circuit, rejecting an alternative rule,[1] held that

> An agreement to terminate a price cutter does not fix prices at any specific or general level but merely frees the complaining dealer to set prices as he chooses . . . . [I]n order for a manufacturer's termination of a distributor to be illegal *per se*, it must be pursuant to a price maintenance agreement with another distributor. That distributor must expressly or impliedly agree to set its prices at some level, though not a specific one. The distributor cannot retain complete freedom to set whatever price it chooses.

780 F.2d at 1216 & 1218.

The writ of *certiorari* was issued to review this decision of the Court of Appeals for the Fifth Circuit. Petitions in other cases are currently pending before this Court, awaiting the outcome of this case.[2]

SUMMARY OF THE ARGUMENT

As a result of *Sylvania*[3] and its progeny, a manufacturer facing interbrand competition has substantial flexibility in developing effective dealer arrangements which can pass muster on the fact-based antitrust rule of reason. Still a manufacturer cannot enter into an "agreement" with a dealer which can be properly characterized as "price fixing" or "price maintaining" without offending a long-established per se prohibition. This Court's 1984 decision in *Monsanto*[4] substantially clarified the "agreement" issue, but was less precise on the "price fixing" issue. The "price fixing" characterization question is a vital one because (i) every discontinued dealer will make a "price fixing" allegation in order to obtain the advantage of a per se rule, and (ii) almost every important distribution activity required by a manufacturer under *Sylvania* has cost, and hence "price" implications.

[1] Business Elecs. Corp. v. Sharp Elecs. Corp., 780 F.2d 1212, 1216 (5th Cir. 1986).

[2] McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323 (8th Cir.), *petition for cert. filed*, 55 U.S.L.W. 3495 (U.S. Dec. 29, 1986) (No. 86-1101); Garment Dist., Inc. v. Belk Stores Serv., Inc., 799 F.2d 905 (4th Cir.), *petition for cert. filed*, 55 U.S.L.W. 3394 (U.S. Nov. 17, 1986) (No. 86-794).

[3] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

[4] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

The ability of a manufacturer to terminate a dealer in order to improve its distribution is important to an efficient, competitive economy. Any dealer termination is an important decision which may go to the heart of a manufacturer's ability to market its products.

In truth, a manufacturer and its distributors are essentially joint venturers in marketing the manufacturer's product. Dealers that fail to carry out education and promotion activities have an inherent advantage over those that do not. They may become "free riders" on the services provided by the full service dealer, making sales to customers who have already been educated and convinced about the product by the full service dealer. This "free rider" problem is obviously of great concern to both a manufacturer and its dealers. Success of their common enterprise necessarily requires communication about the joint marketing program, which may include discussion of non-performance by a competing distributor to the detriment of the overall program.

Concern about compliance with the service aspects of a manufacturer-distributor arrangement is entirely legitimate and cannot properly be viewed as simply an adjunct to vertical "price fixing." Yet performance of legitimate distribution services cannot be entirely separated from pricing. As this Court stressed in *Sylvania*, "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."

A terminated "free rider" should not be entitled to get to a jury on a "price fixing" theory simply because a

price-related complaint preceded termination. Therefore, the operative legal standard must separate those cases in which a manufacturer acts out of a legitimate concern over the performance of distributors, and thus promotes competition, from cases where its ends are illegitimate. The standard must provide concrete guidance for a fact-finder, and thus preclude speculation based upon often ambiguous evidence.

ARGUMENT

I. MANUFACTURERS REQUIRE A CLEAR AND CONSISTENTLY APPLIED LEGAL RULE TO DEAL WITH THE RECURRING SITUATION TYPIFIED BY THIS CASE.

The NAM filed an amicus brief in this Court over four years ago in *Monsanto Company v. Spray-Rite Service Corporation*, 465 U.S. 752 (1984), asking this Court to articulate (1) a clear legal standard to determine when a dealer termination case is to be submitted to the jury and (2) a more structured jury inquiry when it is. In *Monsanto*, this Court said unanimously that there were two characteristic questions in a dealer termination case of this general variety: (1) "the basic distinction between concerted and independent action," and (2) the "important distinction . . . between concerted action to set prices and concerted action on nonprice restrictions." 465 U.S. at 761. The main thrust of the Court's decision was on the first question, but the Court reached some conclusions which are important to the second.

It ruled that the existence of a conspiracy to maintain resale price levels under Section 1 of the Sherman Act cannot be inferred simply from evidence that a manufacturer terminated a price-cutting distributor following the receipt of complaints from other distributors concerning the price cutting. Instead, there must be direct or circumstantial evidence that tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve the unlawful objective of fixing prices. 465 U.S. at 764. The Court thus addressed the fundamental need of manufacturers for clarity in this area.

The ability of a manufacturer to terminate a dealer in order to improve its distribution is important to an efficient, competitive economy. Any dealer termination is an important decision which may go to the heart of a manufacturer's ability to market his products. Such decisions are never taken lightly, particularly in a legal climate that subjects manufacturers to potential liability because another dealer has complained. Any antitrust challenge to a manufacturer's decision to terminate a distributor must recognize the legitimate needs of a manufacturer and its distributors to constantly communicate with one another about marketing. It is perfectly appropriate to exchange information about prices and how the products are being received in the market. A manufacturer is properly concerned that any marketing programs it adopts be properly funded by dealers that must implement them, and that free riders do not interfere. 465 U.S. at 762-63. This is especially true if a product is complex, potentially harmful, new, or generally unknown, since a great deal of labor-intensive promotion and educational activities have to be developed and implemented just to properly display the product.[5] Such an effort requires continuous communication between the manufacturer and its individual distributors and dealers.

Dealers that fail to carry out education and promotion activities have an inherent cost advantage over those that do not. They may become "free riders" on the services provided by the full service dealer, making sales to custom-

[5] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-55 (1977); Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1161 (7th Cir. 1987).

ers who have already been educated and convinced about the product by the full service dealer. *See Sylvania*, 433 U.S. at 55. The distributors who provide the service are placed at a cost disadvantage vis-a-vis the distributor who does not, and the non-complying distributor can reduce prices accordingly. As a result, promotional and educational "services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did." 433 U.S. at 55. This problem, which can apply equally at the distributor level, is particularly acute where (as in this case) distributors are not given exclusive territories.

This free rider problem is obviously of great concern to both a manufacturer and its distributors. Not surprisingly, it is frequently an aspect of ongoing discussions between them. Where a distributor cuts prices sharply, a competing distributor is likely to complain to the manufacturer. A manufacturer has no control over such complaints, and the complaints do not indicate any illegal concerted action. 465 U.S. at 763. Moreover, a manufacturer who assumes greater responsibility for distributor planning is more likely to receive such complaints in the normal course of business. Thus, it is ironic that a manufacturer that is most active in making his product as competitive as possible by monitoring market conditions and by providing educational and promotional materials and services through distributors is also most likely to be sued for an antitrust violation when those distributors provide feedback on the marketplace.[6]

Because communications between a manufacturer and its distributors are important to the success of the com-

[6] The antitrust laws are designed to encourage, not discourage, discussions between manufacturers and distributors on the most effective mechanisms for increasing sales. *See* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984); Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 593 (8th Cir. 1987).

mon enterprise, manufacturers have a vital interest in maintaining good relations with distributors. Thus, negative feedback about price-cutting distributors is likely to trigger an analysis by the manufacturer of whether the price cutting is indicative of a failure to provide sales and educational services. If a distributor is failing in his non-price related obligations, a manufacturer has a legitimate interest in terminating the distributor.

That legitimate interest is intensified when a competing distributor not only complains about the price cutter, but also threatens to terminate his own activities on behalf of the manufacturer. Such a threat gives the manufacturer a Hobson's choice: it must terminate the discount distributor and be subject to suit for "agreeing" with the other distributor to fix prices, or it must be prepared to relinquish the full service distributor, along with the educational and promotional services it provides. If the manufacturer keeps the discount distributor, despite that distributor's failure to comply with contractual obligations, the business that is generated from the full-service educational and promotional program is lost to the substantial detriment of the consumer.

In this situation, it is imperative that this Court delineate a clear set of principles that must be applied. The termination of a dealer following complaints about his prices does not raise an inference of a per se illegal price fixing conspiracy. *Monsanto*, 465 U.S. at 764. Evidence relating to the business justification for a termination is essential to consider.[7] The extent to which remaining

[7] Indeed, there may be a variety of business reasons totally unrelated to price for terminating a free rider, including tax considerations, avoiding mail-order transactions or transshipping, reducing the number of distributors, and avoiding credit problems. Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 663-64 (7th Cir. 1987); Beach v. Viking Sewing Mach. Co., 784 F.2d 746, 750 (6th Cir. 1986); O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1468 (9th Cir. 1986).

dealers alone decide the prices at which they sell is crucial.[8] Juries must be given all the facts and must not be called upon to draw adverse inferences of conspiracy from acts that a manufacturer would do even without having received complaints from another dealer.

II. DEALER COMPLAINTS ABOUT ANOTHER DEALER'S PRICING DO NOT, WITHOUT MORE, CONVERT A DEALER TERMINATION CASE INTO A "PRICE-FIXING" CASE.

Neither party disputes the fact that Sharp may not force a dealer to sell all Sharp calculators at a particular fixed price. Such an agreement takes away the dealer's ability to make independent pricing decisions, preventing him from taking into account the severity of competition in the calculator market, the cost of his sales and promotional activities, and the size of the profit he wants to make. Whether such an agreement is illegal per se[9] or judged under the rule of reason[10] is not the principal issue before the Court, and NAM has taken no position on this issue.

At the other end of the spectrum, neither party disputes that a manufacturer who has received *no* complaints from other dealers may terminate a distributor arrangement with a dealer if the dealer is failing to perform legal contractual obligations under a binding contract.

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[8] AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc., 705 F.2d 1203, 1205-06 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983); Chisholm Brothers Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137, 1142 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974).

[9] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911); O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986).

[10] Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 593 (8th Cir. 1987).

This principle, the *Colgate* doctrine,[11] is essential to marketing flexibility, competitiveness, and, indeed, the freedom inherent in the American free enterprise system.

Somewhere in between these principles lies the *Sharp* case. Had there been no complaints from Hartwell, BEC would never have filed suit, much less be before this Court. Had Hartwell refused to accept a nonexclusive dealership agreement from the beginning, Sharp would have been within its rights to terminate BEC and grant the equivalent of an exclusive distributorship to Hartwell. If BEC had refused to provide manufacturer-required warranty service on calculators it sold, resulting in customers coming to Hartwell for servicing of calculators he did not sell, Hartwell could have complained and Sharp could have terminated BEC.

Because Hartwell complained about discounting by BEC, the spectre of resale price maintenance was raised. Was Sharp terminating BEC because Sharp wanted BEC to perform point-of-sale and other promotional services? Or was the termination part of an agreement between Sharp and Hartwell to keep prices high? If BEC had been selling at full suggested retail prices, and Hartwell issued a "him or me" ultimatum to Sharp, would Sharp have been liable for resale price maintenance for terminating BEC?

When one dealer complains to a manufacturer about another dealer's prices, alarms go off. American manufacturers are extremely sensitive to the state of the law regarding resale price maintenance, the risks of terminating dealers, and the viscissitudes of judges and juries. Indeed, Sharp did everything short of terminating Hartwell to emphasize its inability to require, coerce, or otherwise convince a dealer to abide by its suggested retail prices. It was only when Hartwell's "him or me" ultimatum was presented that Sharp was forced to choose

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[11] *See* United States v. Colgate Co., 250 U.S. 300, 307 (1919) (a business generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently).

between competing dealers on the basis of all factual and legal factors.

Those factors involved the essence of managing a business of any kind. They involved deciding which of two or more alternatives would result in the most competitive product marketing capabilities, considering quality, quantity, efficiency, and compatibility with a marketing program. Sharp exercised its business judgment, and whether it was successful was to be tested in the harshness of the fiercely competitive world of calculators.

Applying to such judgments an additional level of scrutiny under the antitrust laws should be done only when the law is clear and the need for such scrutiny is founded on rational economic and competitive justifications. For an otherwise difficult business decision to be characterized as a price-fixing agreement, there must be evidence of just that. The stakes are high, for a wrong decision exposes a manufacturer to competitive punishment in the marketplace and legal punishment in court.

An agreement regarding price, without enforcement, is a practical nullity.[12] It is not an agreement on price at all, but rather is an exhortatory statement of preference that has no binding effect. A dealer may ignore it with impunity. Thus, the understanding between a manufacturer and a dealer on prices in resale price maintenance cases is crucial to a finding that there is a conspiracy. This Court has held that only when such an agreement is enforced by coercion or some other action by a manufacturer does it run afoul of the Sherman Act.[13]

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[12] *See* Dr. Miles, 220 U.S. 373, 406-08 (1911) (vertical price-fixing restrictions invalid and unenforceable).

[13] Monsanto, 465 U.S. at 764 n.9 (plaintiff must show that distributor conformed to suggested price and communicated its acquiescence or agreement, and that this was sought by the manufacturer); United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960). *See* Yentsch v. Texaco, Inc., 630 F.2d 46, 52 (2d Cir. 1980).

In this case, whether there was such coercion, undue influence or other action sufficient to constitute a conspiracy by Sharp is a question of fact that we are not qualified to resolve. Instead, we seek a reformulation by this Court of the analysis that must be utilized in trial courts to determine whether a conspiracy exists. *Monsanto* made it clear that dealer complaints about the prices of competing dealers are common, natural, unavoidable and legitimate, but at what point does a manufacturer become guilty of "price fixing" for terminating dealers about whom such complaints have been lodged?

Part of the problem is that "price fixing" conspiracy concepts developed in the horizontal competitor context are difficult to apply in the manufacturer-dealer context. Random discussions among direct competitors about prices are often suspect.[14] The question of whether chance contacts among competitors become a "conspiracy" depends on whether the alleged conspirators "had a unity of purpose or a common design and understanding, or a meeting of minds." *American Tobacco Co. v. United States*, 328 U.S. 781, 820 (1946).

In the manufacturer-distributor context, the parties plainly have "a unity of purpose or a common design" to develop an effective merchandising program. This is entirely legitimate. Non-performance of key duties of such a program by any participant is necessarily of concern to others. Pricing is part of the picture, because "free riding" by a non-performing distributor often involves price cutting. *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195 (6th Cir. 1982). Hence the inquiry cannot be simply whether the manufacturer and its distributors communicated and were concerned about price —but whether the actions taken were consistent with the legitimate goals of the manufacturer in establishing the

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[14] *See* A. Smith, The Wealth of Nations 170 (4th ed. 1789), *cited in* United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1370 (5th Cir. 1980).

joint program. Only when communication and any resulting action are shown to be inconsistent with such legitimate goals is there evidence "sufficient to raise an inference of concerted action" and hence go to the jury.

It is clearly inappropriate to apply the "price fixing" label to such complaint-and-termination evidence, which is often economically ambiguous, without regard to the relationship of the communication and conduct to the manufacturer's legitimate goals. As this Court stressed in *Sylvania*, "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." [15] Even in the horizontal competitor context, the Court has stated recently that the inquiry is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). It is very hard to say that communications between a manufacturer and its distributor about the implementation of a bona fide joint marketing program—or the nonimplementation of the marketing program by the competing distributor—are "manifestly anticompetitive" or "always or almost always tend to restrict competition and decrease output." This is especially so where (as in *Monsanto* and *Sylvania*) the marketing program was instituted by a manufacturer with a small market share and it proved successful in enhancing its competitive position.

Concern about compliance with the service aspects of a manufacturer-distributor arrangement is entirely legitimate and cannot properly be viewed as simply an adjunct to vertical "price fixing." Yet performance of legitimate

[15] 433 U.S. at 49-50, discussing the standard formulation in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

distribution services and resale price cannot be entirely separated.

Accordingly, this Court should specifically mandate structured judicial inquiry to govern the recurring complaint-and-termination case. In the light of *Sylvania* and its underlying policies, the focus should be on the vigor of the interbrand competition and the bona fides of the manufacturer's efforts.

The operative legal standard must separate those cases in which a manufacturer acts out of a legitimate concern over the performance of distributors, and thus promotes competition, from cases where its ends are illegitimate. The standard must provide concrete guidance for a fact-finder, and thus preclude speculation based upon often ambiguous evidence. We therefore respectfully suggest that the likelihood a manufacturer's purpose *could* reasonably have been to fix resale prices should be assessed before the jury is permitted to find a conspiracy. To that end, we respectfully suggest that a trial court should consider at least the following questions in determining whether a "conspiracy" claim in a complaint-and-termination case ought to be sent to the jury on a per se basis:

1. Was the manufacturer operating in a market where active interbrand competition existed or was there evidence of a general lack of uniformity in the resale prices of its products? [16]

2. Did the manufacturer have in place a program to improve its overall success in interbrand competition by imposing education, promotion or service responsibilities on its distributors?

[16] *See* National Marine Elec. Distribs., Inc. v. Raytheon Co., 778 F.2d 190, 193 (4th Cir. 1985); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982).

3. Did the manufacturer have a legitimate concern about the plaintiff's failure to satisfy its performance obligations or about other breaches of its distribution contract? [17]

If the answer to each of these questions is "yes," we respectfuly submit that the manufacturer's termination or non-renewal of the plaintiff does not become a "price-fixing conspiracy" simply because one or more competing distributors complained to the manufacturer about the plaintiff's pricing. Accordingly, it should not be submitted to the jury. Instead, for a case to withstand a motion for summary judgment, there must be some evidence that price was the *principal cause* of the termination, and that other legitimate reasons the manufacturer had are found to be either unsupportable pretexts or of insubstantial importance considered in light of any resale price maintenance motives.

Of course, requiring a plaintiff to prove that price alone was the principal cause of a dealer termination is a serious burden. But price fixing conspiracies, subject to treble damages and criminal penalties, are not to be taken lightly by the courts or by the litigants. Proving causation unambiguously is essential where distributor complaints about another distributor's prices are sometimes followed by termination for reasons firmly grounded in the distributor's failure to honor his service obligations.

The Fifth Circuit's ruling provides one way to prove that a termination was caused in fact by a resale price maintenance agreement. It requires proof that a distributor "expressly or impliedly agree[d] to set its prices at some level, though not a specific one. The distributor cannot retain complete freedom to set whatever price it chooses." 780 F.2d at 1218. The existence of a suggested retail price list is some evidence of this, but evidence

[17] *See* Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 663-64 (7th Cir. 1987).

that the list is not enforced eviscerates the probative value of this evidence. The fact that a manufacturer has explained to a distributor its inability to enforce its suggested price list against other distributors is also evidence tending to disprove a price-fixing conspiracy. Indeed, if there is never any indication from the accused manufacturer that it has any intention of enforcing compliance in any way with its suggested price list, it would be unfair and unreasonable for this Court or any court to infer a conspiracy without clear evidence to the contrary.

CONCLUSION

This Court should take this opportunity to make the elements of proof in a case involving an allegation of resale price maintenance absolutely clear. Despite *Monsanto*'s unusual unanimity, the lower courts continue to deal with cases raising questions about this area of law, and both manufacturers and distributors suffer from the uncertainty. Affirmation of the decision below would provide all litigants with clear guidance.

Respectfully submitted,

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November 6, 1987

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